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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. IISAA HAKIMBEY, Defendant and Appellant.	B201141 (Los Angeles County Super. Ct. No. BA309411)

APPEAL from a judgment of the Superior Court of Los Angeles County, Norm Shapiro, Judge. Affirmed.

Melissa J. Kim, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant, Iisaa Hakimbey, appeals from his conviction for deadly weapon assault. (Pen. Code,[1] § 245, subd. (a)(1).) Defendant argues the prosecutor's exercise of a peremptory challenge violated his federal and state constitutional rights and the trial court improperly excluded evidence of a witness's prior arrests. We affirm.

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319; *People v. Elliot* (2005) 37 Cal.4th 453, 466; *Taylor v. Stainer* (9th Cir. 1994) 31 F.3d 907, 908-909.) On September 18, 2006, Evangeline Baguiao was working at McDonalds's restaurant on 18th Street and Western Avenue. Ms. Baguiao saw defendant walk into the restaurant. Defendant began yelling, "Mother fucker" and "Fuck you." Defendant ordered coffee at the counter and continued to yell at Ms. Baguiao. Thereafter, defendant sat down. However, he continued to yell at the counter where Ms. Baguiao was working. Ms. Baguiao saw the security guard, Michael Johnson, enter the restaurant. Mr. Johnson approached defendant. Defendant began yelling at Mr. Johnson.

When Mr. Johnson entered the restaurant, he noticed that several customers appeared startled. Mr. Johnson then heard a man's voice say "What the fuck are you looking at, you punk ass bitch?" Defendant made eye contact with Mr. Johnson and said, "You need to get your ass out of here." Mr. Johnson spoke to defendant. Defendant was told that he was not a customer. Mr. Johnson said he was part of management. Defendant was instructed that if he was not a customer, he should leave before the police were summoned. Defendant continued to use profanity and walked toward another area of the restaurant. Defendant then picked up his backpack and slowly made his way to the

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

south exit. Defendant continued to loudly shout profanities. Mr. Johnson followed defendant outside. Defendant was told he should not return to the restaurant. Defendant became irate and took off his backpack and placed it on the ground. Defendant said "I'm going to fuck your as[s] up." Defendant reached beneath his jacket while walking towards Mr. Johnson. Defendant approached to about an arm-and-a-half length from Mr. Johnson. Defendant then lunged forward and attempted to stab Mr. Johnson with a knife. Defendant grabbed Mr. Johnson. Defendant attempted to strike Mr. Johnson in the face. Mr. Johnson punched defendant. The punch landed on defendant's face. Defendant fell backwards, dropping his knife. Mr. Johnson did not attempt to pick-up defendant's knife. Mr. Johnson went back inside the restaurant and telephoned the police. Mr. Johnson gave the police a description of defendant. Mr. Johnson saw defendant get up and begin to walk toward Western Avenue.

When police officers arrived, defendant had fled. Mr. Johnson gave the officers a description of defendant. Also, Mr. Johnson told them in what direction defendant had fled. Defendant returned to the McDonald's restaurant later that day. Mr. Johnson telephoned the police. Shortly thereafter, defendant was arrested.

Los Angeles Police Sergeant Patrick McCarty responded to the McDonald's restaurant. Sergeant McCarty saw defendant walking toward the McDonald's on Western Avenue. Defendant matched the description given to Sergeant McCarty. Mr. Johnson came out of the McDonald's. Defendant was then detained by Sergeant McCarty and two other officers. As the two other officers searched defendant, a black nylon sheath containing a black folding knife was recovered from his waistband. The knife had a mechanism which caused it to open to a locked position.

First, defendant argues that the prosecutor improperly utilized a peremptory challenge to excuse an African-American prospective juror. Defendant argues the

prosecutor's challenge reflected a group bias. Defendant argues this bias violated his state and federal rights to an impartial jury and equal protection. More specifically, defendant argues that the trial court improperly found no prima facie case had been established and accepted the prosecutor's explanation as legitimate.

During the course of voir dire, the prosecutor exercised a peremptory challenge to excuse prospective juror No. 6674. Thereafter, defense counsel objected. The following colloquy occurred: "[Defense counsel]: This is an African-American male on the panel. My client is also an African-American male. That greatly concerns me. [¶] The Court: Anything else? [¶] [Defense counsel]: Just the statements, he seems like a good open-minded juror. He has a daughter. There were no strong statements either way. [¶] The Court: Okay. I don't know that the challenge has been made, but I am going to justify or give your reasons why you want to excuse. Now, I will throw in the gentleman does have a traffic ticket which I talked off the record with him on while we were getting squared away here. He is going to Orange County on the 21st, two days from today. I'm sorry. The 31st, two days from now. He has an afternoon court date. He asked the court if I could call to - - if he was selected for this jury to get a further continuance on it. I, of course, would do that or try to do that. Whether I would be successful, I don't know. They are pretty tight on those types of things. [¶] In any event, go ahead. [¶] [The Prosecutor]: First of all, just for the record, the fact that the defendant is African-American, so is my main witness and my victim. So me kicking off an African-American would not be beneficial or negative to me considering my victim is also African-American. [¶] Second of all, it's precisely because one of the questions I would usually ask a juror is whether or not he had any traffic tickets or have ever fought any traffic tickets. I didn't get to ask that question here, but we did find out that he has one which he is challenging. He admitted at side-bar that he did break the law in that

instance and sped and that is precisely my concern. One of the questions I got to ask the new jurors is if they could follow the law despite their own feelings. Here you have somebody who clearly, for himself at least, is not willing to follow the law as it stands because of his own feelings. That is a moral issue. The fact he has to be in court two days, but it's the fact he admitted to speeding and breaking the law and he is not willing to take responsibility for it. [¶] The Court: Okay. It presents an interesting statement there. Just because someone is charged with a crime, in this case an infraction, doesn't mean they are not entitled to force the prosecutor, whether it be the city prosecutor in Orange County, perhaps the District Attorney handles those matters, to go ahead and prove a case. One of the first things I said to the man was, 'I guess the first thing you are going to hope when you get out there is the officer doesn't show up.' I don't know if that was on the record. We spent some time talking off the record while we were searching for batteries for our speaker here. But in any event, that is when he had a big smile on his face. [¶] So I know any number of cases people take traffic matters to trial with the hope that the officer won't show up, and they know that almost, I am going to say, a minimum 20 percent of the cases they probably don't. Whether he knows that, I don't know. So I don't know that if everybody charged with a crime we could put a negative onus on it. [¶] . . . [¶] [The Prosecutor]: It's not because he is charged with it, but it's because at least as I heard it he was asked if he was, in fact, speeding. He said, 'Yes.' But he is still challenging it. [¶] . . . [¶] I don't think I could speak to this as this part of a court proceeding. But my concern is, you know, the People have a right and are entitled to have a jury of people who at least are willing to say 'Yes', the law may be harsh, maybe the law may be too strict, but we are going to abide by it. And clearly I think there is some sort of nexus between somebody who admits they, in fact, broke the law but nonetheless thinks it's worth, you know, fighting the process. Whether or not they think

that is fair and in real life or valid, that's a whole other issue. [¶] The Court: First of all, let me get the record straight here. [Defense counsel] made a challenge. It's a Wheeler Batson type challenge merely asking the prosecutor to justify - - I don't know that you have made a prima facie showing on this. [¶] . . . [¶] and I tend to think toward that now. The question is not - - the question is I suppose the District Attorney had indicated what her concerns are in this matter and I don't find her concerns to be unjustifed. We do have peremptory challenges. They don't amount to challenges for cause. But if there are reasons, and I take into account the fact that we have - - the primary people who are involved in this are both African-American, I don't see it playing in as much as perhaps in other situations. [¶] Further, the District Attorney reading the fact that person is going to court on Thursday, he was charged with speeding, does admit that he was over the speed limit although perhaps not as much as the officer said, a few miles, but nevertheless as she reads into that a failure to take responsibility and I think that would justify her challenge, so the Wheeler Batson motion will be denied. I will allow your challenge."

The California Supreme Court has repeatedly held: "Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. (*Batson*[*v. Kentucky* (1986)] 476 U.S. [79,] 97; *Georgia v. McCollum* (1992) 505 U.S. 42, 59; [*People v.*] *Wheeler*[(1978)] 22 Cal.3d [258,] 276-277.) Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution. (*People v. Bonilla* (2007) 41 Cal.4th 313, 341; *People v. Avila*[(2006)] 38 Cal.4th [491,] 541.) . . . [¶] The *Batson* three-step inquiry is well established. First the trial court must determine whether the defendant has made a prima facie showing that the prosecutor exercised a

peremptory challenge based on race. Second, if the showing is made, the burden shifts to the prosecutor to demonstrate that the challenges were exercised for a race-neutral reason. Third, the court determines whether the defendant has proven purposeful discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from the opponent of the strike. (*Rice v. Collins* (2006) 546 U.S. 333, 338.) The three-step procedure also applies to state constitutional claims. (*People v. Bonilla, supra,* 41 Cal.4th at p. 341; *People v. Bell* (2007) 40 Cal.4th 582, 596.)" (*People v. Lenix* (2008) 44 Cal.4th 602; *People v. Lancaster* (2007) 41 Cal.4th 50, 74; see also *Johnson v. California* (2005) 545 U.S. 162, 168.) We review a trial court's denial of a premised motion upon the improper use of a peremptory challenge with deference, examining only whether substantial evidence supports its conclusions. (*People v. Lenix, supra,* 44 Cal.4th at p. 613; *People v. Bonilla, supra,* 41 Cal.4th at pp. 341-342; *People v. Burgener* (2003) 29 Cal.4th 833, 864.) In *Lenix*, our Supreme Court held: "'[T]he trial court must evaluate not only whether the prosecutor's demeanor belies a discriminatory intent, but also whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor. We have recognized that these determinations of credibility and demeanor lie "'peculiarly within a trial judge's province,'" [citations], and we have stated that "in the absence of exceptional circumstances, we would defer to [the trial court]." [Citation.]' [Citation.]" (*People v. Lenix, supra,* 44 Cal.4th at p. 614, quoting *Hernandez v. New York* (1991) 500 U.S. 352, 364-365; *Snyder v. Louisiana* (2008) 522 U.S. ___, 128 S.Ct. 1203, 1208.)

Where a trial court asks for explanation after indicating it has questions about the defense's prima facie showing, "The court's expression of doubt negates any inference that it made an implied finding either way about the existence of a prima facie case." (*People v. Arias* (1996) 13 Cal.4th 92, 135; *People v. Davenport* (1995) 11 Cal.4th 1171,

1200-1201.) The California Supreme Court has held that when the record demonstrates the trial court has merely asked the prosecutor for justifications to make a complete record rather than finding a prima facie case, we need not review the adequacy of the justification. (*People v. Welch* (1999) 20 Cal.4th 701, 746; *People v. Turner* (1994) 8 Cal.4th 137, 167.) When a trial court rules that no prima facie case has been made, the following rules apply on appeal: "'[T]he reviewing court considers the entire record of voir dire. [Citation.] "If the record 'suggests grounds upon which the prosecutor might reasonably have challenged' the jurors in question,"' we reject the challenge. [Citation.]" (*People v. Welch, supra,* 20 Cal.4th at p. 746, quoting *People v. Davenport, supra,* 11 Cal.4th at p. 1200; see also *People v. Bell, supra,* 40 Cal.4th at p. 597.) Once it was satisfied with the reasons given, the trial court was not obligated to conduct further inquiry into the prosecutor's race-neutral explanations regarding prospective juror No. 6674. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1197-1198; *People v. Johnson* (1989) 47 Cal.3d 1194, 1218.)

The trial court stated: "I don't know that the challenge has been made, but I am going to justify or give your reasons why you want to excuse." Thereafter, the trial court explained its off-the-record exchange with prospective juror No. 6674 regarding his impending traffic court appearance. Then, as set forth above, the prosecutor explained her reasons for exercising a peremptory challenge. Following that exchange, the trial court specifically ruled no prima facie case had been demonstrated.

Defendant argues: "[T]he prosecutor's justifications were implausible, giving rise to an inference of purposeful discriminatory intent." However, as set forth previously, we give great deference to the trial court's denial of a motion premised upon the improper use of a peremptory challenge. (*People v. Lenix, supra,* 44 Cal.4th at p. 613 ["We presume that a prosecutor uses peremptory challenges in a constitutional manner

and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.]"]; *People v. Bonilla, supra,* 41 Cal.4th at p. 341; *People v. Avila, supra,* 38 Cal.4th at p. 541.) The California Supreme Court has held that even where a prima facie case has been shown: "The prosecutor need only identify facially valid race-neutral reasons why the prospective jurors were excused. [Citations.] The explanations need not justify a challenge for cause. [Citation.] 'Jurors may be excused based on "hunches" and even "arbitrary" exclusion is permissible, so long as the reasons are not based on impermissible group bias. [Citations.]' [Citation.]" (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1122; *People v. Box* (2000) 23 Cal.4th 1153, 1186, fn. 6; *People v. Turner, supra,* 8 Cal.4th at p. 165; see also *Purkett v. Elem* (1995) 514 U.S. 765, 767.) The trial court could find that the prosecutor might reasonably have challenged the juror in question, based upon race-neutral grounds.

Citing to *United States v. Vasquez-Lopez* (9th Cir. 1994) 22 F.3d 900, 902, defendant argues that the removal of one juror from the cognizable group could be deemed unconstitutional. However, the Ninth Circuit Court of Appeals further held: "Using peremptory challenges to strike [a cognizable group] does not end the inquiry; it is not per se unconstitutional, without more, to strike one or more [members of the cognizable group] from the jury. [(]*Batson* [*v. Kentucky, supra,*] 476 U.S. at [p.] 101. A district court must consider the relevant circumstances surrounding a peremptory challenge. [(]*Batson* [*v. Kentucky*] 476 U.S. at [pp.] 96-97." (*United States v. Vasquez-Lopez, supra,* 22 F.3d at p. 902; see *Snyder v. Louisiana, supra,* 522 U.S. ___, ___; [128 S.Ct. 1203, 1208] ["'[T]he Constitution forbids striking even a single prospective juror for a discriminatory purpose'"] .) Our Supreme Court recently held: "'[E]ven the exclusion of a single prospective juror may be the product of an improper group bias. As a practical matter, however, the challenge of one or two jurors can rarely suggest a

pattern of impermissible exclusion.' [Citations.] Original italics." (*People v. Bonilla*, *supra*, 41 Cal.4th at p. 343; *People v. Bell*, *supra*, 40 Cal.4th at p. 598, fn. 3 ["Although circumstances may be imagined in which a prima facie case could be shown on the basis of a single excusal, in the ordinary case, including this one, to make a prima facie case after the excusal of only one or two members of a group is very difficult. [Citation.]"]; accord *Wade v. Terhune* (9th Cir. 2000) 202 F.3d 1190, 1198.) On this record, defendant has demonstrated neither a prima facie case of an improper peremptory challenge nor purposeful discrimination.

Second, defendant argues the trial court improperly excluded evidence of Mr. Johnson's prior criminal record. Defendant also argues that the exclusion resulted in a violation of his federal due process right to confront and cross-examine witnesses. Defendant also argues that this exclusion was aggravated by the prosecutor's eliciting of testimony that Mr. Johnson was previously a police officer. Following the direct examination of Mr. Johnson, the prosecutor argued that, pursuant to Evidence Code section 1103,[2] his criminal arrest record should not be introduced on cross-examination. Defense counsel argued that Mr. Johnson's prior record involved moral turpitude, including: 1994, perjury and filing a false crime report arrest; 1989, conviction of

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[2] Evidence Code section 1103 provides: "(a) In a criminal action, evidence of the character or a trait of character (in the form of an opinion, evidence or reputation, or evidence of specific instances of conduct) of the victim of the crime for which the defendant is being prosecuted in not made inadmissible by Section 1101 if the evidence is: [¶] Offered by the defendant to prove conduct of the victim in conformity with the character or trait of character." Evidence Code section 1101 states: "Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

carrying a concealed weapon; 1987, misdemeanor battery conviction; and 1981, kidnapping arrest. Defense counsel argued that although the battery and concealed weapon arrests did not involve moral turpitude, they would show a propensity for violence. The trial court ruled: "First of all, the court finds that these incidents are remote in time. They occurred over 13 years ago. That is the most recent, the 1994 acquittal on a perjury or false report. On a 352 issue, further, I'm not going to get into a mini trial on what that case was about that ended up in an acquittal. The 1989 and 1987 matters, I don't know, I guess he was a police officer prior? [¶] . . . [¶] In 1989 the only reason I am making reference is he is carrying a concealed weapon. Not right, but not unusual for someone who was formerly a member of law enforcement to want to have the gun with them for whatever purpose. But that is just the way things are and the way former law enforcement feel. If they are honorably retired, so forth, there are ways for them to go about getting a weapon, permit perhaps. He didn't do so. However, I find that is not a crime of moral turpitude. [¶] And then something that I think is, again, a 352 issue, unduly consumes time to go into it, it might confuse the issues in this case with very little relevance, happening 18 years ago. [¶] The battery in 1987 is even more remote in time. Not a crime of moral turpitude. And it is so remote that any relationship it might have to what occurred in this case, and we are dealing with possible a self-defense issue here, and battery is a crime of, quote, some violence, nevertheless, I'm going to preclude that. [¶] Then 1981 the kidnapping, again, this is very remote in time. It was declined. The victim was unavailable or whatever. I can imagine what that might have been. I don't know a thing about this, but I have an idea this might be a boyfriend/girlfriend thing, some kind of lover's quarrel, something where kidnap, it's on the books, then the party - - I am speculating on that, but I don't feel this is something we need to go into as well, so I am going to preclude you from any of this."

The United States Supreme Court has held that a defendant is entitled to present relevant evidence in support of his or her defense. But that right is not unlimited. (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.) The California Supreme Court has likewise held: "'As a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's [constitutional] right to present a defense. Courts retain . . . a traditional and intrinsic power to exercise discretion to control the admission of evidence in the interests of orderly procedure and the avoidance of prejudice. [Citations.] . . . .'" (*People v. Cudjo* (1993) 6 Cal.4th 585, 611, quoting *People v. Hall* (1986) 41 Cal.3d 826, 834-835.) The California Supreme Court has held: "A trial court may restrict defense cross-examination of an adverse witness on the grounds stated in Evidence Code section 352. [Citation.]" (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 207; *People v. Quartermain* (1997) 16 Cal.4th 600, 623.) Our Supreme Court has also held: "'The trial court has broad discretion in determining the relevance of evidence [citations] . . . .' [Citation.]" (*People v. Smithey* (1999) 20 Cal.4th 936, 973, quoting *People v. Scheid* (1997) 16 Cal.4th 1, 14.) We examine the admissibililty of the proffered evidence utilizing the deferential abuse of discretion standard of review. (*People v. Cox* (2003) 30 Cal.4th 916, 955 [Evid. Code § 352]; *People v. Rodriguez* (1999) 20 Cal.4th 1, 9; *People v. Alvarez* (1996) 14 Cal.4th 155, 201.) No abuse of discretion occurred. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 9; *People v. Quartermain, supra,* 16 Cal.4th at p. 626.)

Here, in addition to being remote in time, the trial court could reasonably find Mr. Johnson's criminal convictions for misdemeanor battery and concealed weapon possession were not crimes involving moral turpitude. In addition, Mr. Johnson was acquitted of the perjury and false crime report charges in 1994. Although, as defendant argues, a witness's past criminal conduct involving moral turpitude maybe admissible for

impeachment purposes, it is subject to the court's discretionary exclusionary authority under Evidence Code section 352.[3] (*People v. Harris* (2005) 37 Cal.4th 310, 337 ["Past criminal conduct involving moral turpitude that has some logical bearing on the veracity of a witness in a criminal proceeding is admissible to impeach, subject to the court's discretion under Evidence Code section 352."]; *People v. Wheeler* (1992) 4 Cal.4th 284, 296 ["In general, a misdemeanor—or any other conduct not amounting to a felony—is a less forceful indicator of immoral character or dishonesty than is a felony. Moreover, impeachment evidence other than felony convictions entails problems of proof, unfair surprise, and moral turpitude evaluation which felony convictions do not present."].) In 1981, the prosecutor declined to charge Mr. Johnson with the kidnapping. The trial court could properly rule this evidence irrelevant and that its presentation would consume an inordinate period of time.

Moreover, our Supreme Court has held: "'[A] trial court's limitation on cross-examination pertaining to the credibility of a witness does not violate the confrontation clause unless a reasonable jury might have received a significantly different impression of the witness's credibility had the excluded cross-examination been permitted.' [Citation.]" (*People v. Whisenhunt, supra,* 44 Cal.4th at p. 208, quoting *People v. Quartermain, supra,* 16 Cal.4th at pp. 623-624.) Even if the exclusion of the evidence proffered by defendant was a mistake under any standard of reversible error defendant is not entitled to a new trial. (*Chapman v. California* (1967) 386 U.S. 18, 22; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1127; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

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[3] Evidence Code section 352 states: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

Both Ms. Baguiao, the McDonald's employee, and Mr. Johnson testified that defendant had become irrational. Defendant screamed obscenities at Ms. Baguiao and others inside the restaurant. When Mr. Johnson entered, defendant yelled, "You need to get your ass out of here." Once escorted outside, defendant continued to threaten Mr. Johnson. Defendant said, "I'm going to fuck your as[s] up." Defendant lunged at Mr. Johnson with an open knife which he retrieved from beneath his jacket. When defendant was arrested later that morning, he was found to have a folding knife in a sheath at his waist. Defendant presented no evidence which materially conflicted with the prosecution case. Any procedural error was harmless.

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KRIEGLER, J.